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No. 73-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

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INDEX

INDEX—Continued

CITATIONS

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

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BRIEF FOR RESPONDENTS

STATEMENT

This case involves the interpretation of § 110(f) of the Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5 (f), which addresses the treatment of air pollution sources that fail to meet previously agreed-to timetables for compliance with the requirements of State Implementation Plans adopted under the Act. Respondents contend that

§ 110(f) should be read as written, so that all requests by individual sources for additional compliance time should be tested by the standards of the federal law. The government, though it published regulations largely in agreement with this view on September 26, 1974, now urges that such requests should be tested by the far more lax standards and procedures of State variance laws, unless, in the judgment of the Environmental Protection Agency ("EPA"), such a request would cause a violation of a National Ambient Air Quality Standard. This condition appears nowhere in the Act, and is utterly inconsistent with its history, structure, and policies. If adopted, it would undermine the most crucial and innovative aspects of the Act, sap its effectiveness, permit continued increases in emissions, and thus assure additional deaths, disease and economic injury among millions of American citizens.

A. The Consequences of Failing to Meet the Act's Requirements.

The Clean Air Amendments are strong legislation, commensurate with Congress' sharp perception of the gravity of the threat to public health and the environment posed by the rapidly increasing emissions of pollutants. For example, emissions of sulfur oxides, one of the most common and deadly pollutants, from steam electric power generating facilities increased seven-fold in the period 1940-1970, from 3 million tons to 20 million tons per year nationally, and in recent years have been rising by over 1 million tons each year.[1] If the accelerating growth in emissions of this pollutant from power plants continues as it has, the Environmental Protection Agency projects that sulfur oxide emissions

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[1] U.S. Environmental Protection Agency, *Nationwide Air Pollutant Emission Trends, 1940-1970*, AP-115 5, Table 3 (1973).

will reach 41 million tons per year by 1980, *thirteen times* their 1940 levels.[2]

The full cost to society of these emissions is, obviously, difficult to establish exactly, but the estimates of the monetary toll alone show it to be substantial. In 1973, the President's Council on Environmental Quality ("CEQ") estimated the quantifiable costs of air pollution in 1968 at some $16 billion annually,[3] a figure which is generally conceded to be roughly accurate.[4] Such figures cannot, of course, fully express the suffering by those afflicted with pollution-induced lung and heart diseases. A recent analysis, done jointly by Cornell University economists, utility industry representatives, and EPA staff for the Federal Power Commission estimated that unless power plant emissions are greatly curtailed, the continued growth in generating capacity will assure violation of the Clean Air Act's standards. The analysis concluded that the failure to meet the National Air Quality Standards would have the gravest consequences for public health:

> The adverse health effects of not meeting clean air standards will be considerable. The number of premature deaths may reach over 6,000 per year by

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[2] U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park, North Carolina (1973), 39, quoting "Abatement of Sulfur Oxide Emissions from Stationary Sources," National Academy of Engineering, COPAC-2.

[3] U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environment Quality* 77-78 (1973).

[4] Report by the Coordinating Committee on Air Quality Studies, National Academy of Sciences, prepared for the Committee on Public Works, U.S. Senate, *Air Quality and Automobile Emission Control*, Volume I, 121 (1974).

1980 and the total excess between 1975 and 1980 could exceed 25,000.[5]

It is this sort of information which led the Senate Public Works Committee, primary authors of the 1970 Amendments, to summarize the reasons for their proposed Amendments as follows:

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[5] The *Report* went on to describe the other effects that could be expected if the National Standards were not met:

> Each year an average elderly person will experience an unnecessary 5 to 10 days when his chronic heart and lung disorders will be perceptibly aggravated. If standards are not met, the excess number of aggravation days for our senior citizens would be 20 to 30 million days each year and total over 160 million days during the years 1975 to 1980. Each year a typical asthmatic might expect one to two unnecessary asthma attacks. If standards are not met, the excess number of asthma attacks would be 6 to 10 million each year and could total over 50 million during the years 1975 through 1980. Each year otherwise healthy children would experience 400 to 900 thousand more common but severe acute respiratory disorders like croup, acute bronchitis and pneumonia. Between 1975 and 1980 children would be burdened with more than 4,500,000 excess acute respiratory illnesses if standards are not met. If standards are not met, adults would be burdened more frequently with persistent chronic respiratory disease symptoms. In 1975 an excess of more than 900,000 adults would be involved and by 1980 an excess of over 1,500,000 adults might be expected to report persistent chronic respiratory disease symptoms.

It concluded:

> In summary, present rough estimates conclude that substantial excess adverse health effects can be expected each year if standards are not met: thousands of premature deaths, millions of days of illness among susceptible segments of the population, hundreds of thousands of needless acute lower respiratory illnesses in otherwise healthy children and hundreds of thousands of chronic respiratory disorders among adults.

Chapman, et al., *Power Generation: Conservation, Health, and Fuel Supply, A Report to the Task Force on Conservation and Fuel Supply, Technical Advisory Committee on Conservation of Energy.* National Power Survey, U.S. Federal Power Commission 17-18 (1973).

> The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants . . . . These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

S. Rep. No. 91-1196, 91st Cong., 2d. Sess. 1 (1970).

At the same time, those who have studied the problem generally agree that the cost of controlling air pollution is less than the cost it imposes on the nation. The CEQ estimates that unless pollution is controlled, the damages from all sources of air pollution will amount to some $24.9 billion annually by 1977.[6] Yet EPA estimates that the cost of abating air pollution will not exceed $14 billion annually for the next five years.[7]

B. History of the Clean Air Amendments of 1970.

The 1970 Amendments represent a major break with prior federal air pollution control efforts, occasioned by the accelerating threat to human health and welfare and Congressional dissatisfaction with previous efforts to control this threat. For 15 years, through four separate pieces of legislation, Congress sought to solve this public health problem by granting federal and state administrators wide discretion. By 1970 it was clear that these attempts had failed. The air pollution problem was worsening at an increasing rate. Thus the 1970 Amendments reflect deep Congressional impatience with the long history of inaction by both State and federal bureaucra-

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[6] U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environmental Quality* 78 (1973).

[7] U.S. Environmental Protection Agency, *The Cost of Clean Air: Annual Report of the Administrator of the Environmental Protection Agency to the Congress of the United States* I-4 (1974).

cies, and are intended to restrict substantially the range of administrative discretion and State authority.

Prior to 1970, the federal air pollution legislation was a near textbook model of federalism. The first major federal act dealing with the problem was the Act of July 14, 1955, 69 Stat. 322 ("1955 Act"). This Act was an invitation to the States to act: it set out the problem and promised federal support, but specifically gave responsibility for standard-setting and enforcement to the States.

After eight years of State inaction, Congress passed the Clean Air Act of 1963, 77 Stat. 392 (1963) ("1963 Act"). The legislature recognized that since 1955 there had been accelerating growth in the air pollution problem. 1963 Act § 1(a), 77 Stat. 392, 42 U.S.C. § 1857 (a). In light of the deteriorating situation, Congress gave the federal government its first, greatly limited, enforcement power, a complex and unwieldly "conference" procedure for interstate pollution problems, which could, with sufficient perseverance, lead to court action. 77 Stat. 396, presently 42 U.S.C. § 1857(d), as amended. Two years later, Congress increased slightly the power of the federal government to take action to abate pollution, giving the federal authorities the authority to begin the conference and hearing process without receiving a formal request from the States. Amendments to the Clean Air Act, 79 Stat. 996 (1965).

By 1966 only 26 States had established legislative controls over air pollution. Many of those States' statutes were riddled with variance provisions that undermined effective action to clean the air. U.S. Depart. of Health, Education, and Welfare, "A Digest of State Air Pollution Laws," Public Health Service Pub. 711, at ii (1966).

As a result of continuing State failure to act, Congress once again increased the federal responsibility for controlling air pollution by passing the Air Quality Act of

1967, 81 Stat. 485 (1967) ("1967 Act"). Federal authorities were to designate "Air Quality Control Regions" and to publish air quality "criteria"—compilations of the results of scientific studies of the effects of various pollutants on human health and welfare. 81 Stat. 490.

The 1967 Act still provided State and federal administrators wide discretion. For example, the federal government was given eighteen months merely to designate the boundaries of Air Quality Control Regions ("AQCR's") and asked to compile the air quality "criteria" documents only as soon as practicable. 81 Stat. 490. But the National Air Pollution Control Administration ("NAPCA") failed to carry out even these first minimal steps towards air pollution control with the anticipated dispatch. By the end of 1969 criteria documents had appeared for only two of the six most prevalent pollutants.[9] After nearly three years, NAPCA reported to Congress in 1970 that it had managed to designate only twenty-five Air Quality Control Regions.[10] Only 12 enforcement actions were ever undertaken during the three years of the Act's life.[11]

As the continued failure of federal and State administrators to act became manifest, the United States Congress addressed itself again, for the fifth time in

[9] The criteria document for sulfur oxides first appeared in 1968, and was reissued in 1970, U.S. Dept. of Health, Education, and Welfare, Public Health Service AP-50; the one for particulate matter was issued in January of 1969, as AP-49. During the hearings on the 1970 Amendments, Senator Randolph remarked acidly on the fact that publication of three additional criteria documents occurred only when Congress convened hearings. Hearings on S. 3229, S. 3466, 3546 before the U.S. Sen. Comm. on Public Works, Subcomm. on Air and Water Pollution, 91st Cong., 2d Sess. 126 (1970) [Hereinafter, "Sen. Clean Air Amendments Hearings"].

[10] *Id.* By contrast, under the 1970 Act AQCR's were to be designated within 90 days, § 107(c), 42 U.S.C. § 1857c-2(c). As a result the total number of AQCR's rose in three months to 247.

[11] BNA Environment Reporter, Federal Laws 41:1201-65.

15 years, to the goal of protecting public health and welfare from the effects of air pollution. The Clean Air Act Amendments of 1970, 42 U.S.C. 1857 *et seq.*

Rejecting Administration [11] and House [12] bills that would have largely perpetuated the tradition of granting wide discretion to State and federal administrators, the Congress chose in 1970 to limit the discretion that had undermined previous efforts to abate pollution. Unlike previous legislation, the 1970 Amendments are studded with explicit deadlines for action [13] and specifically articulated standards for decisions.[14] If the States fail to act as required, EPA must step in with federal regulations.[15] If inaction continues, EPA is directed to take over State pollution control programs and to use its greatly increased enforcement powers.[16] In case either EPA or a State government fails to discharge its duties,

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[11] S. 3466, printed in Sen. Clean Air Amendments Hearings, *supra* 26 *et seq.*

[12] H.R. 17255, H Rep. No. 91-1146, 91st Cong., 2d Sess. 26 *et seq.* (1970).

[13] *See, e.g.*, § 108(a)(1) and (2), 42 U.S.C. § 1857c-3(a)(1) and (2); § 109(a)(1) and (2), 42 U.S.C. § 1857c-4(a)(1) and (2); § 110(a)(1), (a)(2), (c)(1)(C), 42 U.S.C. § 1857c-5(a)(1), (a)(2), (c)(1)(C), § 111(b)(1)(A) and (B), § 1857c-6(b)(1)(A) and (B); §112(b)(1)(A) and (B), 42 U.S.C. § 1857c-7(b)(1)(A) and (B); § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2); § 202(b)(1), (2) and (4), 42 U.S.C. § 1857f-1 (b)(1), (2) and (4); § 212 (d)(3)(F), 42 U.S.C. § 1857f-6c(d)(3)(F); § 231(a)(1) and (2), 42 U.S.C. § 1857f-9(a)(1) and (2); § 313, 42 U.S.C. § 1857j-2.

[14] *See, e.g.*, § 108(a), 42 U.S.C. § 1857c-3(a); § 109(b), 42 U.S.C. § 1857c-4(b); § 110(a)(2), (a)(3), (c), (e) and (f); 42 U.S.C. § 1857c-5(a)(2), (a)(3), (c), (e) and (f); § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1); § 112(a)(1), 42 U.S.C. § 1857c-7(a)(1); § 113(a)(1), (2) and (3), 42 U.S.C. § 1857c-8(a)(1), (2) and (3); § 202(a) and (b), 42 U.S.C. § 1857f-1(a) and (b); § 207(c), 42 U.S.C. § 1857f-5a(c); § 211 (c), 42 U.S.C. § 1857f-6c(c); § 212(a)(4), 42 U.S.C. § 1857f-6c(a)(4); and § 231(a), 42 U.S.C. § 1857f-9(a).

[15] § 110(c), 42 U.S.C. § 1857c-5(c).

[16] § 113, 42 U.S.C. § 1857c-8.

the Act gives citizens the right to sue for injunctive relief in federal court.[17]

C. The Regulatory Scheme.

In drafting the Clean Air Amendments, Congress drew upon its 15 years of experience to fashion a regulatory scheme designed to prevent the administrative backsliding that had gone before, and tailored to the special regulatory problems posed by the physical nature of the air pollution problem.

The vehicle for the attainment of air quality protecting public health and welfare is the State Implementation Plan. § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The purpose of this document is to describe the measures needed to curtail air pollution, and to force the State to bind itself to take these measures.

The statute requires the Environmental Protection Agency to promulgate regulations establishing National Primary and Secondary Ambient Air Quality Standards, indicating concentrations of pollutants in the general outdoor ("ambient") air just below those that have been demonstrated to have adverse effects on people (Primary Standards) and the remainder of the environment (Secondary Standards). § 109, 42 U.S.C. § 1857c-4. These levels are assumed, for purposes of the law, to constitute threshold concentrations below which damage does not occur.[18]

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[17] § 304, 42 U.S.C. § 1857h-5.

[18] The assumption that such thresholds exist must be seen as a matter of regulatory convenience, rather than scientific fact. Congress was informed, even as it considered the Clean Air Amendments, that the scientific community doubted the assumption, believing it more likely that air pollutants caused injury to public health at any concentration in the ambient air. Dr. Middleton, then head of the National Air Pollution Control Administration (EPA's predecessor with respect to air pollution control), for example, told the Senate Subcommittee members that in his opinion

One of the crucial innovations of the Amendments is the requirement that the States commit themselves, in their State Implementation Plans, to a stated deadline for the attainment of each type of Standard. In the case of Primary Standards, protecting public health, the State must attain the Standard "as expeditiously as practicable," but in any case no more than three years from the federal approval of its Plan.[18] In the case of

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the thresholds then under consideration were probably artifacts of our present scientific knowledge:

> We know from the criteria published for sulfur oxides, that at certain levels definite adverse effects occur in the lung. We also know that at a little lower level there are more subtle effects on the action of the lung, and that below that some enzyme system begins to fail or to function improperly. The no-effect level would have to be somewhere below that, but as science progresses, it is very likely that we are going to find still other body chemical systems that are being affected, *so the no-effect level always corresponds, you might say, to the limitations of scientific knowledge in this area.* [emphasis supplied.]

Sen. Clean Air Amendments Hearings, *supra*, 1490.

This is one reason why some States considered it prudent to seek to attain air cleaner than the National Standards, and why both Congress and EPA encouraged this quest. § 116, 42 U.S.C. § 1857d-1, and 40 C.F.R. § 51.13(d).

[18] The history of this requirement indicates that it was increasingly tightened as the bill progressed through the Congress. The Administration's original bill would have required the attainment of Standards only within "a reasonable time." S. 3466, § 7(a), printed at Sen. Clean Air Amendments Hearings, *supra*, 37. The original bill proposed in the Senate Subcommittee on Air and Water Pollution contained identical language, as did the House bill. S. 3546, § 4, which would have amended § 108(c) of the 1967 Air Quality Act, printed at *Id.*, 49; H.R. 17255, § 108(c)(1)(C)(i), printed at H.R. Rep. No. 91-1146 26 (1970).

The bill finally passed by the Senate was stricter, but still less stringent than the Act itself. It would have required the attainment of the Standards "within three years" of the date of the approval of the State Plan. S. 4358, § 111(a)(2)(A), printed in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 68, 87 (1970).

[Footnote continued on page 11]

Secondary Standards, the State must specify in its Plan a "reasonable time" for attainment. § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Experience with previous federal legislation demonstrated forcefully, however, that *ambient air quality* standards were not sufficient alone to regulate sources of pollution.[20] Because the air is continuously moving, mixing pollutants emitted from sources over very large areas,[21] it is impossible except under very rare circumstances to relate the air quality at any given spot to the emissions from any given polluter with sufficient certainty to satisfy the court-room standards of proof. For this reason, the Clean Air Amendments also require each State to adopt enforceable *emission limitations*, for each general category of source, specifying quantities of pollutants that may be released at the smokestack.[22] These

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[19] [Continued]

The Conference Committee further tightened these deadlines, and the Amendments as passed require each State to choose a deadline for attainment that is "as expeditious as practicable but (subject to subsection (e)) in no case later than three years from the date of approval." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

[20] This point was made virtually from the time of passage of the Air Quality Act of 1967, which required the States to adopt only ambient air quality standards. *See, e.g.*, John E. O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW AND CONTEMPORARY PROBLEMS 275 (1968). For a recent discussion of this point, *see* Richard E. Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, (forthcoming) 4 ENVIRONMENTAL LAW QUARTERLY—(Fall, 1974).

[21] Rall, David P., *A Review of the Health Effects of Sulfur Oxides*, National Institute of Environmental Health Services, N.I.H., Research Triangle Park, North Carolina 22 (1973). Also, U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park North Carolina p. a-b, (1973).

[22] The Report of the Senate Committee made this point very clearly:

> Because attainment of ambient air quality is possible only through the enforcement of precise and objective emission

emission limitations are the tools for attaining the goal of healthful air quality.[23] To determine what emission limitations would be necessary, the States first calculated the degree to which the National Ambient Air Quality Standards were being exceeded in each of the natural airsheds within their territory.[24] On the basis of these calculations, each State then adopted uniform emission limitations for various relatively homogeneous classes of polluting sources throughout each airshed, or throughout

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controls the Committee bill would delete the enforcement requirement for the abatement of violations of the air quality standard. The precise and objective emission controls "subject to enforcement" would include but not be limited to emission requirements, emission standards, standards of performance, prohibitions of emissions, schedules and timetables of compliance and other requirements for recordkeeping and the installation of monitoring equipment.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 21 (1970). *See also, Id.*, 12, and testimony of Terry L. Stumph and Robert L. Duprey, of the National Air Pollution Control Administration, before the Senate Subcomm. on Air and Water Pollution, Sen. Clean Air Amendments Hearings, *supra*, 397 (1970).

The Congressional intent to use emission limitations as the regulatory basis of the 1970 Amendments was also discussed at length in the 1972 Senate Oversight Hearings on the Act. *See* Hearings, "Implementation of the Clean Air Amendments of 1970," before the Senate Comm. on Public Works, Subcomm. on Air and Water Pollution, 92nd Cong., 2d Sess. 180, 207-209, 244, 268-271 (1972).

[23] Emission limitations may take various forms, depending on the kind of industry being regulated and the most efficacious methods for reducing its effluent. Some emission limitations prescribe the quantity or weight of pollutants per pound of material processed that may be emitted from a factory's smokestack, leaving entirely up to the industry the technique to be used to comply with the limitation. Some specify the allowable pollutant concentration in the fuel used. Others, in industries such as steel manufacturing, specify that a particular process or procedure be used in order to reduce emissions.

[24] The 1967 Air Quality Act first required the States to designate the natural airsheds within their boundaries for the purposes of air pollution control. These areas are known as Air Quality Control Regions ("AQCR"). § 107, 42 U.S.C. § 1857c-2.

the State as a whole. These easily enforceable emission limitations, rather than the ambient air quality standards, establish the actual degree of control that each source of pollution must undertake.

Some regulated sources were, of course, already closer to meeting the emission limitations that applied to them than others at the time the State Implementation Plans were adopted. In order to provide the flexibility needed to take account of these differing circumstances, the Act required States to negotiate individual compliance schedules for meeting the general emission limitations for each pollution source. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Compliance schedules extending over more than 12 months included enforceable "increments of progress," in order to assure that the source does not fall behind in taking the required control actions. 40 C.F.R. § 51.15(c), App. 9.

If an individual source fails to meet the negotiated timetable, the regulatory agency must decide whether to authorize additional time for compliance or subject the source to jeopardy of enforcement action. This case presents the question of which level of government Congress intended to make this decision, and what criteria are to be used to decide whether a source shall be given additional time, even after it has failed to meet a previously agreed-upon compliance schedule. Under the State laws that governed prior to the Clean Air Amendments, a source owner could seek a delay by applying for a "variance" from the State pollution control agency. If (usually after a public heading) the State agency determined that the polluter had met vaguely specified standards of hardship,[25] it could grant a variance pre-

[25] The Georgia statute that was the object of the court's decision below, GA. CODE ANN. § 88-912, is a catalogue of the kinds of hardship considerations in most State statutes. It is reprinted at the end on this brief, *infra* at 51.

venting the State (or any other party) from suing for enforcement of the original timetable.

At issue in this case is one of the key provisions of the Act, which embodies Congress' decision to limit the discretion of federal and State administrators to grant such sources additional time for compliance. § 110(f), 42 U.S.C. § 1857c-5(f). As noted previously one of the major weaknesses in the State air pollution control programs that had grown up under the earlier clean air statutes was the broad discretion given State administrators to grant variances to escape clean-up deadlines. The Georgia vairance statute, with its broad and vague standards, poorly articulated procedures, and low visibility administrative discretion, is an archetype of these laws. It was obvious that the deadlines and other carefully drawn requirements of the 1970 Amendments would be threatened if administrators were allowed to continue exercising this vast discretion. Congress thus explicitly pre-empted such State variance laws with the federal postponement procedure of § 110(f), which sets up a highly visible procedure for reaching a decision and specifies clear standards for deciding whether more time is warranted. This procedure is the linch-pin of the entire federal scheme. For the protection of public health and welfare, and the vindication of Congressional intent, it must be upheld as written.

Under § 110(f), an individual polluter must demonstrate, in a federal administrative adjudicatory proceeding, that he meets four specific requirements in order to obtain a one year "postponement" of his timetable for compliance:

(A) that he has made good faith efforts to comply with the Plan's requirement;

(B) that the necessary technology or other methods of control are not available or have not been

available for a sufficient period of time to enable compliance;

(C) that he has implemented the available alternative operating procedures or other interim control measures to minimize the impact of continued noncompliance on public health;

(D) that continued operation of the sources is essential to national security or public health and welfare.

§ 110(f)(1)(A)-(D), 42 U.S.C. § 1857c-5(f)(1)(A)-(D).

Keeping in mind that Congress did not intend to sanction granting individual polluters additional compliance time willy-nilly, the requirements for obtaining a postponement are neither burdensome nor unreasonable. A polluter who asks for additional time for compliance is asking the government to sanction emissions that will damage the health and welfare of its people—emissions which he had earlier agreed to abate. In such a situation, it does not seem unreasonable to require the polluter to show that his inability to comply on time is the result of real impossibility, despite good faith efforts; that he is applying all the alternative interim measures he can to reduce the damage to health until he can comply; and that the operation of his source of pollution has a social value that justifies the additional social harm he seeks to inflict. When one considers the Congressional purpose in enacting the Clean Air Amendments, it seems hardly untoward to burden those who would endanger public health with the duty to justify their request.

All parties before the Court agree that this federal procedure pre-empts State variance laws. The disagreement has to do with what circumstances trigger pre-emption. Respondents, in concert with the court below and three of the other four Courts of Appeal that have considered the issue, maintain that pre-emption is trig-

gered as of a date certain. The Fifth Circuit, tracking the clear and unequivocal language of the statute, held that once the EPA Administrator approved a State's Implementation Plan, the State's variance law was pre-empted. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 489 F.2d 390, 398-403 (5th Cir. 1974). The First Circuit agreed, but, seeking to allow EPA and the States somewhat more flexibility, stretched the statute's language to hold that pre-emption occurred only as of the date chosen by the State for attainment of the National Primary Ambient Air Quality Standards. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 478 F.2d 875, 884-888 (1st Cir. 1973). Two other Courts of Appeals, those for the Eighth and Second Circuits, followed the First Circuit. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 483 F.2d 690, 693-694 (8th Cir. 1973), and *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 494 F.2d 519, 523 (2d Cir. 1974). The practical effect of these four decisions becomes increasingly similar as the States' attainment dates approach.[26]

EPA acceded to this interpretation in regulations published September 26, 1974 (after the filing of its petition for certiorari with this Court), which disapproved the variance statutes of all the States. 39 Fed. Reg. 34533-37, 34572-74 (Sept. 26, 1974), App. 11-27. In its brief here, however, the Agency has taken a radically different position, claiming that pre-emption is triggered only upon its own finding that a State variance will result in air quality worse than a National Air Quality

[26] Thirty-two of the States chose July, 1975, or earlier, as the date for attaining the National Standards for the pollutants most associated with the stationary sources that could be expected to request variances or postponements. The remaining 18 received extensions of the attainment date under § 110(e), 42 U.S.C. § 1857c-5(e), up to two years.

Standard. This represents a return to its earlier position, which was rejected explicitly by four of the five Courts of Appeal.

This approach was also considered, and rejected, by Congress, when it wrote the Clean Air Amendments, as part of the general Congressional decision to avoid the use of ambient air quality standards to regulate individual pollution sources which has been discussed previously. It would have the effect of undermining the uniform national regulatory system that Congress sought in passing the Amendments, thus setting back seriously the nation's effort to restore the air to breathable quality. And it is flatly inconsistent with the plain words of the statute itself. For these reasons, this Court should reject EPA's newest attempt to return to its discredited earlier interpretation, and order the Agency to adhere to the scheme adopted by Congress.

SUMMARY OF ARGUMENT

The question in this case is the proper interpretation of § 110(f), the federal postponement procedure of the Clean Air Amendments of 1970. Section 110(f) provides a federal procedure for determining whether an individual source of pollution may be granted additional time to meet previously agreed-upon compliance schedules for curtailing its emissions into the air. Respondents, in concert with the court below, take the position that once the initial regulatory actions were taken under the Amendments, the federal procedure pre-empted lax State variance laws. EPA, on the other hand, urges that the federal procedure pre-empts only after its own decision that the requested variance would prevent the attainment or maintenance of a National Ambiant Air Quality Standard—a decision which it has admitted, in other contexts, is subject to as much as 100 per cent error.

Section 110(f) is not ambiguous, and it provides no room for the interpretation EPA is attempting to give it. The section provides that a federal proceeding before EPA shall be convened whenever "*any* stationary source" seeks additional time "to comply with *any* requirement of an applicable implementation plan" [emphasis supplied]. Congress chose this language from among several alternatives that would have allowed the States to continue granting variances. The legislature chose to adopt a uniform federal system, with clear procedures and standards for decision, in order to prevent the administrative backslidi.g and playing off of one State against another that had hobbled earlier clean air legislation.

The statute provides that an approved Implementation Plan may be altered through a "revision," § 110(a)(2)(H), (a)(3), 42 U.S.C. § 1857c-5(a)(2)(H), (a)(3), and EPA has sought to justify its approval of State variance laws under its revision authority. This simply cannot be squared with the statute. A revision (the word is used six times consistently in § 110) is a device initiated by EPA for making general changes in an entire Implementation Plan if, for example, EPA promulgates a new National Ambient Air Quality Standard. A postponement, on the other hand, is a procedure invoked by the source-owner (through his Governor) to alter a specific portion of a State Plan as it applies to that source.

Five Courts of Appeal have reviewed the question presented here. All five held that EPA may not claim power from the revision authority of the statute to allow States to grant variances. Four, including the Court below, agreed with respondents that the federal postponement provision pre-empts State variance laws as of a time certain, rejecting EPA's argument that pre-emption is triggered by a judgment about air quality. The court below held that pre-emption occurred when State Plans were approved, while the First Circuit, fol-

lowed by the Second and Eighth, held that pre-emption occurred only in the "post-attainment" period—the period after the date chosen by the State for attainment of the National Primary Standards. For practical purposes, these four decisions are becoming increasingly indistinguishable, since in most States the attainment date, at least for Primary Standards, is mid-1975

EPA's own regulations even belie its present position. EPA has repeatedly stated that it does not believe ambient air quality measurements or estimates are appropriate to make regulatory decisions for individual sources. Recently, the Agency applied this to variances, promulgating regulations that explicitly pre-empt all state variance statutes in the post-attainment period. These regulations abandon any attempt to use air quality to determine when State variance laws are pre-empted, or to claim authority for this attempt from the revision authority of the Act.

These regulations purport to adopt the First Circuit's holding. Much as they undermine EPA's position, they do not meet the requirements of the Act. The legislative history of the Act shows that Congress considered pre-empting State variance laws only in the "post-attainment" period, but decided, as part of a general tightening of key parts of the bill, that the postponement provision should apply whenever "any source" seeks more time to comply with "any requirement" of a State Plan.

Interpreting the postponement provision as it is written is crucial to the attainment of the Congressional purpose. If EPA may determine when § 110(f) applies by ad-hoc air quality judgments (which it admits may be quite inaccurate), then the whole structure of the Act collapses. Unable to determine with precision when a source is violating air quality standards, the States and EPA will be easy prey to political pressure and hardship arguments on a case-by-case basis. In the end, emissions will

continue to rise, the National Standards will not be attained, and we can expect the serious health consequences outlined previously, *supra* 2-5.

The postponement provision will not be more burdensome to administer than EPA's proposal. Far from simplifying matters, EPA's variance revision scheme would involve two agencies rather than one and inject several new issues into the decision whether to grant more time—some such as air quality, extremely difficult and costly to determine. The revision process is anything but expeditious. In the past, EPA has often taken a year or more to approve a revision. On the other hand, if the postponement provision operates as Congress expected, it will deter some sources from seeking additional time, reducing the Agency's burden while encouraging compliance.

Nor is it necessary to sanction EPA's misreading of the statute because of State reliance on EPA's interpretation. EPA has suggested that it allowed variances to entice the States into choosing early dates for the expiration of compliance schedules and attainment of Standards. If this is true, there was no need for it. The States were required to choose the earliest date practicable for attaining the Standards, and EPA had a duty to disapprove any Plans that did not. As a matter of fact, early dates were not chosen. Only three of the States where the Primary Standards were violated chose attainment dates earlier than the statutory maximum time period. And many individual compliance schedules are still being negotiated, nearly three years after they were to have been submitted under the statute. Thus reliance, though a theoretical possibility, has not in fact occurred.

The supposed reliance problem EPA cites arises from the fact that EPA did not correct the failure in some State laws to distinguish between compliance schedules, negotiated when the Plan was being adopted, and later

requests for additional time. This could have been done at the time the State Plans were submitted, and under EPA's own regulations, should have been. Instead, the Agency chose to ignore its own clarifying regulation in the hope that it could use the ensuing confusion as a lever to coerce the courts into its view of the postponement procedure. This attempt should be rejected, and appropriate action ordered.

ARGUMENT

I. THE CLEAN AIR AMENDMENTS PRE-EMPT THE STATES FROM ISSUING VARIANCES TO THE TIMETABLES OF COMPLIANCE, EMISSION LIMITATIONS, AND OTHER REQUIREMENTS OF STATE IMPLEMENTATION PLANS.

A. This Conclusion is Compelled By The Language And Structure Of The Act, And Its Legislative History.

This case presents a straight-forward question of statutory interpretation: whether § 110(f) of the Clean Air Amendments is the exclusive mechanism for a polluting source to request more time to comply with the timetables of compliance for meeting the emission limitations and other requirements of its State Implementation Plan. As always, the words of the statute itself provide the first and authoritative indication of the intent of the legislature. In this case, these words are surpassingly clear:

> Prior to the date on which *any stationary source (or class of moving sources)* is required to comply with *any requirement of an applicable implementation plan* the Governor of the State to which the plan applies may apply to the Administrator to postpone the applicability of such requirement to such

> source (or class) for not more than one year. [emphasis supplied]

42 U.S.C. § 1857c-5(f)(1).

These words are stark and unequivocal—a request for additional time from *any* individual pollution source to comply with *any* requirement must be made through the postponement procedure. There is not the slightest suggestion in these words that the application of this procedure is limited either in time or circumstance. Once a State Plan becomes "applicable"—that is, once it has been approved by the Administrator[28]—an individual pollution source may not obtain an alteration in its timetable for compliance save through a postponement proceeding.[29]

Congress chose this language from among several alternatives. The Administration favored continued State control over deadlines,[30] which would have perpetuated the lax State variance statutes. So did the original House bill.[31] But Congress rejected these proposals resound-

[28] *See* § 110(a) and (c), 42 U.S.C., § 1857c-5(a) and (c).

[29] Of course, the source may actually take more time to comply, even if it does not seek or fails to obtain a postponement, but only at the risk of enforcement action. As a practical matter, sources that are exerting good faith efforts may have little to fear from enforcement actions, even if they do not qualify for a postponement, since the Federal and State agencies may have far fewer resources than they need to enforce fully the Act's requirements, and therefore may choose to act against willful violations first.

But the possibility that enforcement action could be taken will tend to encourage source-owners to achieve compliance as rapidly as possible.

[30] *See* Sen. Clean Air Amendments Hearings, *supra* at 1501-02, and note 19, *supra*.

[31] *See* note 19, *supra*.

ingly,[31] opting instead for a bill that required any request from a specific source to defer the requirements of an Implementation Plan applicable to it to go through the federal postponement procedure. Senator Eagleton, a prominent draftsman of the 1970 Act, explained why:

> . . . I don't want [the public] to think we passed a clean air act that has variances depending upon the reasonable rate of implementation which goes on endlessly.[32]

A strict construction of the Act's language is also the only interpretation consistent with its structure and purposes as a whole, as the court below correctly noted:

> In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.
>
> Section 1857c-5(f) is the device Congress chose to assure this. Congress aimed to make "variances," "postponements," or whatever departures from earlier commitments might be called unusual and difficult to obtain.

Natural Resources Defense Council, et al. v. *Environmental Protection Agency*, 389 F.2d 390, 401-402 (5th Cir. 1974). If variances were easy to obtain, the deadlines for attaining healthful air quality, which were perhaps the most innovative aspect of the 1970 Act,

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[31] For example, the Senate bill, which largely became the Act, passed by a margin of 73-0. 116 Cong. Rec. S33129 (daily ed., Sept. 22, 1970).

[32] Sen. Clean Air Amendments Hearings, *supra*, at 1502.

would become meaningless. Under the Act, each State must specify a deadline in its Plan that represents the most expeditious practicable date for attainment of the Standards. In order to reach this goal, the State relies on each regulated source to meet its timetable for compliance with the emission limitations. If, because of lenient State variance laws, the State agencies are forced to grant sources additional time, the attainment of the statutory goal will be frustrated.

What is more, the national uniformity in pollution control laws that Congress sought would be wrecked. One of the greatest reasons for the failure of the 1967 Air Quality Act to improve the air pollution problem was that by leaving to the States the setting of standards, emission limitations, and deadlines, it left them subject to whipsawing by recalcitrant industries. Polluters could often prevent the adoption of strong State regulations by threatening to move their facilities to jurisdictions with more lenient laws. This unhappy experience comprised part of the Congressional motivation for requiring uniform National Air Quality Standards and limiting the maximum time that could be taken to meet the Standards.[33] Understanding these facts from past experience, Congress concluded, after considering other mechanisms, that it must enact a tougher uniform federal variance procedure to replace the State laws, and it did.

EPA suggests, *inter alia*, that the existence of the "revision" authority provided by § 110(a)(2)(H) and (a)

[33] The political pressure that can be applied to prevent any State from exceeding the minimum federal requirements has been graphically illustrated once again in the States' choice of their deadlines for attaining the National Standards. Despite the Act's injunction to choose the earliest practicable attainment date, only three of the States where Primary Standards were violated picked a date earlier than the statutory maximum of three years from the date of EPA's approval of the Plan. *See* note 55, *infra*.

(3) shows Congress did not intend that all changes in compliance schedules and other individually applicable requirements be made through the postponement procedure. EPA's Brief 21. This claim, as the court below and all of the other Courts of Appeal that have reviewed the issue have agreed,[1] reflects a serious confusion of the carefully distinguished purposes and applicability of the revision and postponement provisions, the only two means of changing an Implementation Plan, once approved,[2] provided by the statute. Both words— "postponement" and "revision"—are carefully used words of art. The distinction between them is akin to that between a general revision of a zoning ordinance and a zoning variance. The revision section requires State Implementation Plans to include a procedure for revision under three circumstances:

> (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

The *revision* procedure is a device initiated by an EPA finding or action for making *general* changes in the en-

[1] *See infra*, at 28-30.

[2] Prior to the Administrator's approval, a State may request an "extension," which may extend the maximum time allowable for the attainment of a National Primary Standard to as much as five years. § 110(e), 42 U.S.C. § 1857c-5(e). An extension must be requested by the Governor of the State, and the State must show that (1) using all available means of controlling pollution, it will be impossible to meet the Standard; and (2) all reasonably available means of control will be applied in the interim in order to minimize the danger to public health. *See* NRDC, *et al.*, v. EPA, 475 F.2d 968 (D.C.Cir. 1973).

tire Plan. Section 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). The *postponement* procedure, on the other hand, is initiated by an *individual source* (through his State Governor) to alter a *specific* compliance schedule, emission limitation, or other element of the Plan *as it applies to him*. Both apply from the date the State Plan is approved, but to different situations.

The word "revision" is used consistently some six times throughout § 110 of the Act to indicate a procedure for changing large portions of a State Plan upon specified findings by EPA. The primary indications of Congressional intent are § 110(a)(2)(H) and (a)(3), 42 U.S.C. § 1857c-5(a)(2)(H) and (a)(3). But the word is also used in four other places in contexts that reinforce the interpretation given here. § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1); § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i); § 110(c)(1)(C), 42 U.S.C. §1857c-5(1)(C); and § 110(d), 42 U.S.C. § 1857c-5(d). Significantly, "revision" does not appear in either the postponement section or in the section that imposes a duty on the States to adopt emission limitations and compliance schedules. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Nor is it ever referred to in any way in connection with these sections.

Unlike the postponement procedure, which is initiated by the source-owner (through his Governor), the revision procedure is initiated by an action of EPA. § 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). And unlike the postponements, whose purpose is to delay abatement, the purpose of revisions is to restructure State Plans to accelerate abatement or attain it in greater concert with other national goals. *Id.* The revision section requires States to provide for revising their Plans in four specified situations: (1) if the Administrator promulgates new National Air Quality Standards; (2) if new or more expeditious methods of controlling pollution become available, allowing the State to attain the existing National

Standards more quickly;[36] (3) if the Administrator finds, contrary to his earlier judgment in approving the Plan, that it is substantially inadequate to achieve the existing National Standards within the State's chosen deadlines; or (4) if the Administrator finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards.[37]

Each of these eventualities would substantially alter the underlying basis for the entire State Plan. For example, if the Administrator were to promulgate a new National Primary Standard of 50 micrograms per cubic meter for sulfur oxides, replacing the present 80 microgram Primary Standard, each State's entire control strategy for meeting the Primary Sulfur Oxides Standard would have to be changed. A State that could meet the 80 microgram Standard by reducing the sulfur oxide emissions by 20 percent might now have to reduce them by 50 percent to meet the new Standard. In effect, such a change would require a substantially new Plan, setting new emission limitations, controlling sources which previously could have been left uncontrolled, and perhaps

[36] Though the statute does not state that this judgment shall be reached by the Administrator, the structure of the Act suggests that such a finding would probably be made nationally. *See, e.g.*, §§ 111 and 112, 42 U.S.C. § § 1857c-6 and 1857c-7. EPA's superior research and evaluation resources, which far exceed those of any of the States, also virtually assure that EPA will make such judgments.

[37] The Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256 (1974), added this section directing EPA to conduct a study and to notify the State if it finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards. § 110(a)(3)(B), added by the Energy Supply and Environmental Coordination Act of 1974. But, consistent with Congress' earlier decision, based on its doubts that the National Ambient Air Quality Standards would fully protect public health, *see* note 18 *supra*, to encourage States to adopt more protective Plans, did not require the States to revise their Plans on the basis of EPA's notification.

instituting other additional types of controls contemplated by the Act. *See* § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). For this reason, the Act provides for EPA review parallel to that for the original Plan. §§ 110(a)(3) and 110(c)(1)(C), respectively; 42 U.S.C. §§ 1857c-5(a)(3) and 1857c-5(c)(1)(C). As with the original Plan, the Administrator may approve a Plan revision only if (1) it has been subjected to public hearing, and (2) it meets the general requirements for an Implementation Plan set out in "paragraph (110(a)(2)." Section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3).

B. EPA's Proposed Reading Of The Statute Has Been Rejected By The Courts Of Appeal That Have Reviewed The Issue.

Five Courts of Appeal have reviewed the issue presented here. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974) (the court below), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1974), and *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, No. 72-2145, —— F.2d —— (9th Cir. Nov. 11, 1974). All five rejected EPA's interpretation of the Act's revision sections. All but one also rejected EPA's claim that pre-emption of State variance laws depended on EPA's determination of whether the requested variance would prevent attainment or maintenance of a National Ambient Air Quality Standard, holding this legally irrelevant to the question of when § 110(f) pre-empted State variance laws.

The opinion of the Fifth Circuit, the court below, is the most consistent and carefully reasoned. Canvassing the

history and regulatory scheme of the Act, and role of the postponement procedure in effectuating the Act's purposes, Judge Wisdom wrote for a unanimous court that the federal postponement provision should be strictly construed:

> We cannot accept the Administrator's reading of the statute. Nothing in the statute supports the limitation of section 1857c-5(f) to situations involving sources so large that a single variance granted it threatens the attainment of a national ambient standard. Section 1857c-5(f) speaks in terms of "*any* stationary source," and the postponement of "*any* requirement of an applicable implementation plan." This language is not ambigous and lends no basis for the construction the Administrator puts on it. [emphasis in the original.]

Natural Resources Defense Council, et al., v. *Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

The First Circuit, followed by the Eighth and the Second, also rejected out of hand the position now urged by EPA:

> Had Congress meant § 1857c-5(f) to be followed only if a polluter, besides violating objective State requirements [i.e., compliance schedules, emission limitations, and similar regulatory provisions of the Plan], was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See, e.g., Getty Oil Co.* v. *Ruckelshaus*, 342 F.Supp. 1006 (D.Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), cert. denied 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

Natural Resources Defense Council, et al., v. *Environmental Protection Agency*, 478 F.2d 875, 886 (1st Cir. 1973).

The two leading courts did not reach precisely the same result, however, because the First Circuit failed to implement the logic of its reading of the statute. Rather, stating its concern that the States have "flexibility" in the period prior to the date they had promised to meet the National Standards, the court held that the federal provision pre-empted only in the "post-attainment period." 478 F.2d 875, 887. As shown below,[38] this position was considered and rejected by Congress when it passed § 110 (f), and is not in fact necessary to provide the flexibility the Court sought. With the "attainment date" fast approaching for most States, however, the practical difference between this interpretation and that of the Fifth Circuit is disappearing; and in any case, EPA's position can draw no sustenance from either of them.

C. EPA Has Abandoned In Its Own Regulations The Position It Urges On The Court Here.

EPA has repeatedly promulgated federal regulations that are premised on the fact that ambient air quality standards, though essential as the goal for State Implementation Plans and for determining the general State emission limitations, are not a proper tool for the regulation of specific sources of pollution. Until recently, however, it retained the regulation that was declared illegal by the court below. This regulation provided that:

> A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such [an individual] source(s) will not necessitate a request for a postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the

[38] *See* 34, *infra*.

> time specified in such [State Implementation] plan: *Provided, however*, that any such determination will be deemed a revision of an applicable plan under [40 C.F.R. § 51].6.

40 C.F.R. § 51.32(f), originally promulgated as 42 C.F.R. § 420.32(f), 36 Fed. Reg. 15486, 15494 (Aug. 14, 1971). In September, 1974, however, after the filing of its petition for review in this case, the Agency promulgated new regulations that revised this regulation and abandoned entirely its claims that the applicability of the federal postponement procedure depends on whether a source's request for more time would prevent the attainment or maintenance of a National Standard. These regulations also ended the Agency's attempt to find support for this position in the revision sections of the statute. 39 Fed. Reg. 34533-37, 34535 and 34572-74 (Sept. 26, 1974).

In other contexts, EPA has for some time taken the position that air quality measurements (or estimates) are not a proper mechanism for regulating individual pollution sources. For example, in proposed regulations to implement this Court's ruling on significant deterioration,[39] EPA had the following to say about one of the techniques for relating emissions from individual sources to ambient air quality:

> Current diffusion modelling techniques, when uncalibrated and used in the absence of baseline air quality data, *can exhibit random errors as high as a factor of two [100%] for short term concentrations and a factor of 1.5 [50%] for annual averages* when compared with known concentrations of pollutants. It should be noted that in assessing most average concentrations, particularly those resulting

[39] Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), aff'd per curiam without opinion by the D.C. Court of Appeals, aff'd by an equally divided Court, 412 U.S. 541 (1973).

> from multiple sources, significantly better accuracy can be obtained. However, this is not the type of application normally associated with the significant deterioration concept, which calls for pre-construction review *of individual new sources.* [emphasis supplied]

39 Fed. Reg. 31000, 31003 (Aug. 27, 1974).

The Agency has also rejected the use of so-called "intermittent" or "supplementary" controls, an alternative to emission limitations that depends on ambient air quality as the trigger for invoking control actions, on the grounds that with rare exceptions ambient air quality measurements are not adequate or enforceable with respect to individual sources.[40]

These regulations obviously conflict with the position EPA took in its original regulation concerning State variances, quoted above. Until recently, however, EPA clung to its variance regulation, even in the face of the adverse court decisions described in the previous section. In September, 1974, however, the Agency promulgated new regulations that revised its variance regulations, abandoning entirely the position the Agency now urges before this Court. These regulations revised 40 C.F.R. § 51.32(f), to read as follows:

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[40] In July, 1972, EPA rejected any use of intermittent controls because it did not believe that emissions could be related to ambient air quality with sufficient certainty to assure enforceability. 37 Fed. Reg. 15095 (July 27, 1972). In a later proposed rule-making, EPA proposed to allow the use of intermittent controls only on "isolated sources," which would "assume responsibility for all ground-level concentrations of the pollutant covered by the supplementary control system in all areas significantly affected by its emissions." Proposed Appendix P to 40 C.F.R. Part 51, 38 Fed. Reg. 25697 (Sept. 14, 1973). Perhaps because of EPA's continuing doubts about whether intermittent controls can be enforced, the Agency did not promulgate these proposed regulations. Recently it disapproved a State regulation that would have allowed the unrestricted use of intermittent controls. 39 Fed. Reg. 29357 (Aug. 15, 1974).

> A State's decision to defer the date by which a source must achieve compliance with an applicable plan provision will not necessitate a request for a postponement under this section [40 C.F.R. § 51.32] if the deferral meets the following requirements:
>
> (1) Compliance is not deferred beyond the applicable attainment date specified in Part 52 of this chapter [the date(s) chosen by the States for attainment of the National Primary and Secondary Ambient Air Quality Standards] . . .

39 Fed. Reg. 34533, 34535 (Sept. 26, 1974).

At the same time, the Agency disapproved all State variance statutes, 39 Fed. Reg. 34535-37, promulgating new regulations for compliance schedules and proposing a substitute federal regulation to replace the disapproved variance statutes. 39 Fed. Reg. 34572, 34573. In explaining the reason for this decision, the Agency cited the decisions of four Courts of Appeal, and purported to adopt the interpretation of the statute given by the First Circuit Court of Appeals.

Because of the different interpretation of the statute rendered by the Fifth Circuit, EPA did not attempt to make these regulations binding on the States within the jurisdiction of that court. 39 Fed. Reg. 34533. But the regulations do represent a binding public declaration that the Agency has now abandoned entirely the claim that federal pre-emption of State variance laws occurs only when a proposed variance would prevent the attainment or maintenance of a National Standard, and discarded its attempt to find support for this position in the revision authority of the Clean Air Amendments. While these new regulations still do not comport with the proper interpretation of the statute given by the court below, they do evidence clearly EPA's agreement that the position it now urges before this Court cannot be supported by reference to the Clean Air Amendments.

D. The Legislative History Of The Act Demands That Postponements Be The Exclusive Means Of Relief.

The foregoing demonstrates that EPA's interpretation of the federal postponement provision cannot be squared with the language or structure of the Clean Air Amendments, with the relevant court interpretations or even with EPA's own administrative interpretation of the Clean Air Amendments. The remaining legal question is whether the Fifth Circuit, or the First, Eighth and Second, correctly interpreted the law. The Fifth Circuit's opinion, in addition to its greater faithfulness to the plain language of the statute, is also the only one consistent with the legislative history of the Act.

The legislative history of the Clean Air Amendments shows that Congress considered other schemes for dealing with variances, among them the one urged by the First Circuit, but rejected them in favor of pre-empting State variance procedures entirely. This choice was a necessary concomitant of the Congress' decision, consistent with its often-stated desire to return the air to healthful quality as quickly as possible, to require the States to meet the National Air Quality Standards "as expeditiously as practicable." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). *See* note 19, *supra*.

The ancestors of the provision at issue in this case were drawn on the assumption that the statutory deadline for attaining the National Standards was a flat three years. The Senate-passed bill contained two provisions for altering a State Plan. S. 4358, Sections 111(e) and (f), S. Rep. No. 91-1196, 91st Cong., 2d. Sess. (1970) at 89. Section 111(e) of the bill was plainly the forerunner of the "revision" sections (Section 110(a)(2)(H) and (a)(3) of the Act).[41] It would have pro-

[41] § 111(e) of the bill is printed at App. 34.

vided that if the Secretary [42] determined, on the basis of new studies or other information, that a State Plan was inadequate to attain the National Standards, he must give the State a chance to revise its plan; in the event that it did not, he must promulgate a revised Plan adequate to meet the Standards.

The bill would have limited revisions even more closely than the Act does; a Plan could have been revised only when the Secretary had determined it was inadequate to reach the Standards. In the Act, the revision procedure was given a slightly wider, though still circumscribed, scope, and a provision that would have allowed the Secretary to extend the State's deadline for meeting National Standards through a revision was placed in a separate section (§ 110(e), 42 U.S.C. § 1857c-5(e)) from the revision authority in order to reinforce the distinction between changes that hastened or assured attainment of healthful air quality, and those that slowed it. *See* 24-28 *supra*.

Section 111(f) of the bill was the ancestor of the present "postponement" provision, now contained in Section 110(f).[43] It would have allowed a three judge federal court, at the request of the source (conveyed through the State Governor), to grant "relief from the effect of such expiration [of the deadline for meeting National Standards]" to an individual source. That is, the court could have allowed delay in meeting the requirements of an approved Plan applicable to the source, such as

[42] At the time the Senate wrote the bill, it would have been administered by the National Air Pollution Control Administration of the Department of Health, Education, and Welfare. Before final passage of the Act, EPA was created. Thus the bill refers to the "Secretary" where the Act uses "Administrator."

[43] § 111(f) was the precursor of both the postponement and extension provisions of the Act. The extension provision is not at issue in this case. *See* note 35, *supra*. The text of proposed § 111(f) is reprinted at App. 34-36.

a compliance schedule or emission limitation. In other words, under the bill what is now the "postponement" procedure would have been confined exclusively to situations where a polluter sought to continue violating the State emission limitations beyond the bill's three year deadline meeting for the National Air Quality Standards. In short, the Senate bill, consistent with its three-year deadline for attaining the National Standards, would have pre-empted State variance laws only in the post-attainment—as it was then written, post-three year —period.[44]

The Senate bill was altered in the Conference Committee to provide that a source's attempt to delay compliance with "*any* requirement" of a State Plan would be considered a "postponement," while an enlargement of the three-year maximum time period for meeting the National Standards in an Air Quality Control Region or State as a whole would be considered an "extension."[45]

This change was necessary to conform this provision with the change in the deadline for attaining the National Primary Standards made by the Conference Committee. The Senate-passed bill would have required only that the States meet the National Standards "within three years from the date of [the Plan's] approval." S. 4358, § 111(a)(2)(A), S. Rep. No. 91-1196, 91st Cong. 2d Sess. 87 (1970).

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[44] But even the Senate bill would not have sanctioned allowing the States to control the triggering of the postponement procedure by deciding whether a polluter was causing a violation of National Standards. Under the bill, triggering would have been automatic: prior to the statutory deadlines, the postponement procedure would not have applied; after the deadline, it would have. The bill, in other words, would have adopted the First Circuit position, *see* 30, *supra*.

[45] *See* n. 35 *supra*. This change was considered important enough for comment in even the cursory discussion in the Conference Committee's Report, H. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970).

This language was strengthened by the Conference Committee. Seeking to assure healthful air quality as soon as possible, the Committee replaced the Senate's three-year deadline with language that required the State Plans to

> Provide for the attainment of such primary [National Air Quality] standard, *as expeditiously as practicable* but in no case later than three years from the date of [the Plan's] approval [emphasis supplied.]

§ 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Thus, the law does not leave the State free to take three years to attain the National Standards, as EPA's Brief assumes,[46] if they can accomplish it sooner. A State must provide for meeting the National Standards as soon as possible, using all the means "practicable" to accomplish this task. The earliest date "practicable" is the date the State must choose.[47]

Under the language of the Senate bill, it would have been possible for a State to grant a variance without preventing it from attaining the National Standards within the mandated deadline, since this would have been a flat three years. But under the Act this is impossible, since the States must choose to meet the Standards at the earliest "practicable" date. To attain the National Standards "as expeditiously as practicable" can have only one meaning: that the State has required the maxi-

[46] EPA's Brief 10-12, 28.

[47] Curiously, EPA's original regulation on variances, 40 CFR § 51.32, since abandoned by the Agency (*see* 30, *supra*) also adopted Petitioners' reading of "as expeditiously as practicable." It provided that States should determine whether a proposed variance would prevent attainment of the Standards "within the time specified in such a plan," 40 CFR § 51.32(f), not "by the end of a three-year period," as would be consistent with the present interpretation adopted in EPA's Brief.

mum available controls on all sources at the earliest possible date. Thus *any* variance would, *a fortiori*, delay the attainment of the National Standards beyond the date previously considered the earliest one practicable.[1]

In short, the logic of the Act dictates that there simply are no cases where States can grant variances that will not affect their ability to meet the National Standards within the statutory deadline. EPA's claim that there are such situations amount to either (1) ignoring the fact that Congress materially altered the Senate bill in Conference, or (2) an admission that the Agency failed to meet its statutory obligation to assure that the States chose to attain the Standards at the earliest practicable date.

Against this solid evidence of Congressional intent, EPA is able to muster only an equivocal quotation from Senator Muskie in his introduction of the conference bill in the Senate. EPA's Brief 26. Discussing the federal postponement provision, he said that it would allow "A Governor [to] apply for a postponement of the deadline, if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan . . . ." 116 Cong. Rec. S42384-5 (daily ed., Dec. 18, 1970). Whether the Senator correctly referred to the "deadline" embodied in a State compliance schedule, or was merely thinking of the rejected language that had previously been included in the bill reported from his Senate Subcommittee is unclear. In any case, it is pale authority with which to refute the actual

[1] For example, a State may have provided, in its Plan, that it would meet the National Standard for sulfur oxides by the end of 1974, by requiring, among other things, large fossil-fueled power plants to install equipment to remove sulfur from their exhaust gas streams by that time. If such sources were then granted variances, perhaps because their suppliers were unable to provide the necessary equipment until six months later, the State would be forced to meet the National Standards that much later.

changes in the language of the bill made by the full Conference Committee.

II. INTERPRETING THE POSTPONEMENT PROVISION AS WRITTEN IS CRUCIAL TO THE ATTAINMENT OF THE CONGRESSIONAL PURPOSE.

In examining the policy issue presented in this case, it is important to keep in mind the purpose of the Clean Air Amendments. This law was passed because of the acknowledged hazards to human health and welfare posed by air pollution—hazards, which as anyone who walks the streets of any major American city knows, have gotten worse at a rapidly accelerating rate in the last two or three decades.

The Act was intended to reverse this trend, drastically reducing the usually unnecessary and often wasteful emissions of pollutants that produce this public health menace.

The regulatory system designed to achieve this objective is a complex one, but it is all built on a very sage judgment about human nature: people are far more likely to take a task seriously if they are given a deadline for completing it, and told that the deadline will be difficult to escape. If this Court should reach for an interpretation outside the language of the statute, as EPA urges it to, this objective will be thwarted. The force of the deadlines for attaining healthful air quality will be largely broken, and the Congressional purpose therefore subverted.

Under the postponement procedure, Congress made the granting of additional compliance time dependent on three basic factors: a history of good faith effort by the source to abate emissions, a judgment that technology to do better is not yet available, and a conclusion that the benefits of continued operation outweigh the dangers it

poses to the health and welfare of people. To ensure that these factors were judged by uniform standards, it placed the decision in EPA, rather than the 50 different State governments. It avoided having EPA make judgments about the effect of the source of ambient air quality, because, as we have seen, such a judgment cannot be made accurately, and because it knew from past experience that depending on such an uncertain standard provided recalcitrant polluters with the room for debate that would maximize pressure for concessions by regulatory agencies and for challenge in the courts, rather than the incentive to act expeditiously to control emissions.

Both the Fifth and the First Circuits understood and endorsed these sound considerations of public policy. Quoting Senator Muskie, the Fifth Circuit noted the importance of applying the postponement provision to all attempts to extend compliance schedules:

> "The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met."
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> 116 Cong. Rec. S16091 (daily ed. Sept. 21, 1970), quoted at Note *supra*, at 581. In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

The First Circuit put it more succinctly:

> To allow a polluter to raise and perhaps litigate that issue [the effect of a variance on air quality] is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See e.g., Getty Oil* v. *Ruckelshaus*, 342 F.Supp. 1006 (D. Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), *cert. denied*, 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

478 F.2d 875, 886.

Throughout the other briefs before the Court, these sound considerations of public policy are hardly mentioned. Instead, both the government and the *amici curiae* intently assert, without evidence, reasons why they claim the postponement procedure will not work,[49] or will not accomplish the purpose Congress intended.[50]

The short answer to these claims, of course, is that they are irrelevant to the case before this Court. The question here is what Congress said and intended, not whether the mechanism chosen was the best one possible. *See* 21-28, *supra*. As we have shown previously, Congress considered a number of possible alternative systems for handling the problem of sources that could not, or did not want to, comply with the requirements of State Implementation plans. The one urged by the First Circuit (and EPA in its September 26, 1974, regulations) was embodied in the Senate bill, and the one supported by EPA here was contained in the House and Administra-

[49] EPA's Brief 28-30; Brief of *amicus curiae* Edison Electric Institute 21-26.

[50] EPA's Brief 41-46; Brief of *amicus curiae* Edison Electric Institute 21-26.

tion bills. Congress heard the arguments for these alternatives, and decided to reject them. If EPA and the regulated industries disagree with that judgment, they may urge them once again on the legislature. Since these objections have been raised here, however, respondents believe the Court should be aware of their deficiencies.

A. Pre-emption Of State Variance Laws By The Federal Postponement Procedure Would Not Increase The Burden Of Administering The Clean Air Act.

Under the system urged by EPA, a request by a source for deferral of compliance beyond the end of its compliance schedule sets in motion a series of administrative determinations. In the first instance, a State agency must convene a proceeding to review the request for a variance under State law. Under most State variance laws, the agency must consider the same questions that must be considered under the federal postponement provision, as well as others. Most State laws allow the source to raise the issue of cost, a complex issue which may not be raised in a postponement proceeding.[51] In order to comply with EPA's interpretation the State must also take evidence on whether the requested variance will result in pollution exceeding the National Air Quality Standards, a question which also is not germane in a postponement proceeding.

If the State decides that a postponement proceeding is not called for, its proposed variance will undergo the "revision" procedure provided in EPA's regulations. 40 C.F.R. § 51.6. The revision process can, and frequently

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[51] Congress reached its own policy decision on how to strike the balance between protection of the public and economic costs, and consistently avoided allowing the cost issue to be injected into proceedings with respect to individual sources. *See, e.g.*, S. Rep. No. 91-1196 2 (1970), and Natural Resources Defense Council, et al., v. Environmental Protection Agency, 478 F.2d 875, 888-889 (1st Cir. 1973), Natural Resources Defense Council, et al., v. Environmental Protection Agency, 489 F.2d 390, 411-413 (5th Cir. 1974).

does, take months to complete; and delays of over a year in revision approval by EPA are not uncommon. The steps in the revision process are numerous: the State must first publish notice of the proposed revision, make available the proposal, and hold a public hearing normally no sooner than 30 days after the proposal is available. 40 C.F.R. §§ 51.4, 51.6(f). The State must then consider the hearing record, formally adopt the revision, and submit it to EPA for review. 40 C.F.R. § 51.6(d). EPA then begins review and, if it determines the revision may be approvable, publishes a notice of receipt of the revision in the Federal Register, giving a minimum of 30 days for public comment. EPA apparently takes the position that it is not required to approve or disapprove such revisions within a specific period of time, for the Agency has on a number of occasions allowed more than a year to pass between the submission of a revision and EPA approval or disapproval action.[52]

Thus, the revision process is a long one and no requirements for expeditious handling are recognized by any of the participants. And, if, after analyzing a proposed State variance, EPA concludes that the variance would jeopardize a National Standard, EPA must then undertake a postponement proceeding anyway.

In short, the procedure urged by EPA is one that requires administrative duplication and examination of sev-

[52] For example, on September 10, 1973, the State of Washington submitted a proposed Plan revision to EPA. EPA published notice of receipt of this revision on November 15, 1973. 38 Fed. Reg. 31513. On September 20, 1974, a year after the revision was submitted to the Agency, EPA asked Washington State to provide additional supportive information. To date, the revision has still not been approved. *See also*, Tennessee Revision: submitted to EPA on June 27, 1973; Federal Register notice published December 14, 1973, 38 Fed. Reg. 34477; EPA approval of the revision on August 8, 1974, 39 Fed. Reg. 28528. *See also*, Connecticut Revision: State hearings held, August 9-15, 1973; submitted to EPA, January 9, 1974; EPA notice in the Federal Register, April 26, 1974, 39 Fed. Reg. 14728; EPA has still not approved it.

eral additional issues of fact. Even if the State and EPA ultimately agree that a postponement proceeding is not called for, this multi-stage process is hardly a model of dispatch. The simple fact, ignored in EPA's brief, is that any request for additional time for compliance, no matter how the agencies deal with it, will consume considerable administrative resources and time.

It would thus appear that EPA's real concern is not the total administrative costs or burden of the two alternatives, but rather the *distribution* of the burden. Under EPA's proposed scheme, the State agencies, which are largely underfunded and undermanned,[53] would be forced to share the costs of considering requests for additional time. The statutory scheme would relieve the States of these costs by placing them on EPA. While the phenomenon of bureaucratic self-protection is a well-known one, it is hardly an excuse for bending the Congressional mandate.

EPA also seems to assume that the number of requests for additional time will be the same under either its proposal or the statutory postponement system. This sugges-

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[53] According to EPA's *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974*:

> Control agency resources are being strained by the increased program demands being placed upon them . . . At present the control agencies are approximately 3000 man-years below the estimate of needed resources. [p. 2].
>
> The anticipated 1975 and 1977 expenditures for accomplishment of the basic SIP and anticipated revisions are approximately $188 million and $210 million, respectively. In 1974, the agencies had available approximately 69 percent of the funds stated as needed by 1975. Approximately one-third of the States spent less than 60 percent of their stated revised 1975 needs. [p. 108].

U.S. Environmental Protection Agency, Office of Air and Waste Management, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974* (1974).

tion indicates just how much the Agency has lost sight of the animating concepts of the law. For the whole purpose of enacting the postponement provision, and its certain effect, was to encourage efforts to comply by discouraging applications for more time from all but those sources that could clearly establish their inability, despite their best efforts, to meet their previously negotiated timetables for compliance. *See* discussion *supra*, at 14. If Congress was right, then the total administrative burden will be smaller if the law is construed correctly than it will be under the scheme proposed by EPA, even if each individual application requires more time for consideration. If the Congress was wrong, the net result will be to add nothing to the burden EPA and the States are already carrying. If Congress is right, the likelihood of curtailing the death, illness, and discomfort caused by pollution will be increased. EPA's proposal, which would prevent even giving the Congressional scheme a test, would have little chance of accomplishing this result.

B. The States Did Not Rely On EPA's Erroneous Interpretation Of § 110(f).

EPA's brief also claims that the Administrator's erroneous interpretation of § 110(f) was justified as a means to encourage the States to pick early dates for the expiration of compliance schedules and the attainment of National Air Quality Standards.[54] Thus the Agency says it would be unfair to the States that chose early dates in reliance on this interpretation to change the rules of the game now. This argument is mere post-hoc rationalization. EPA had no need to resort to such tactics, nor did EPA's interpretation affect the States' compliance schedules or attainment dates.

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[54] EPA's Brief 29-30, 41.

1. ***EPA's Interpretation Was Not Needed to Induce the States to Choose the Most Expeditious Practicable Attainment Dates.***

The Administrator is not so impotent under the statute that he needed to coax the States into commiting themselves to meeting the National Standards expeditiously. As we have noted repeatedly, an acceptable State Plan must provide for attainment of the National Primary Standards "as expeditiously as practicable." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). *See* discussion *supra*, note 19. The law also mandates EPA to disapprove a Plan that adopts a later attainment date and to promulgate substitute federal regulations adopting a more expeditious date. 42 U.S.C. § 1857c-5(c). EPA has used this power liberally. *See* 37 Fed. Reg. 10842, *et seq.*, (May 21, 1972), 40 C.F.R. Part 52. The Agency can not now claim that its erroneous interpretation of § 110(f) was necessary to entice the States into complying with the law.

2. ***EPA's Interpretation Had No Effect on the Attainment Dates and Compliance Schedules Chosen by the States.***

If EPA's decision to allow variances was designed to induce early attainment dates and short compliance schedules, it was a total failure. All but three of the States chose to take at least the three years' maximum time allowed in the statute for the attainment of any National Standard that was being exceeded in an AQCR.[55] Eighteen States actually sought and obtained extensions of the deadline for meeting the National Primary Standards to *beyond* three years, in many cases up to the maximum five years permitted under the "extension" provision.[56]

[55] Only the plans for Texas, Virginia and Washington, among States where the Primary Standards were violated, provided for attainment of Standards prior to mid-1975. *See* 37 Fed. Reg. 10897, 10900, 10901 (May 31, 1972).

[56] 37 Fed. Reg. 10847 *et seq.* (May 31, 1972).

§ 110(e), 42 U.S.C. § 1857c-5(e). Thus if the Court requires a return to the proper interpretation of § 110(f), it will work no injustice on the States.

The same can be said for compliance schedules. EPA's own regulations and practices with respect to compliance schedules inadvertantly prevented foreshortened expiration dates by encouraging States to negotiate and submit compliance schedules long after State Plans were approved. Though the statute provides that States were to have submitted their compliance schedules as part of their Plan (i.e., in January, 1972), § 110(a)(1) and (a)(2)(B), 42 U.S.C. § 1857c-5(a)(1) and (a)(2)(B), the Agency unilaterally extended this deadline, by regulation, until February 15, 1973.[57] Actually, few States met even that extended deadline, and EPA is still promulgating its approvals of State compliance schedules.[58] In nearly every State, in other words, the negotiation of compliance schedules occurred after respondents herein and others had filed suits across the country challenging EPA's decision to allow variances, and many, if not most, negotiations occurred after the First Circuit had declared

[57] 40 C.F.R. § 51.15(a)(2) provides

> A plan may provide that compliance schedules for individual sources or categories of sources will be formulated following submittal of the plan. Such compliance schedules shall be submitted to the Administrator within 60 days following the date such schedule is adopted but in no case later than the prescribed date for submittal of the first semiannual report required by § 51.7. . . .

40 C.F.R. § 51.7, referred to in § 51.15, provides that semi-annual reports shall be submitted to the Administrator within 45 days of the end of prescribed semi-annual reporting periods. The first semi-annual report was not due until 45 days after December 31, 1972, or February 15, 1973. Thus the net effect of the Administrator's action was to defer the date for submission of compliance schedules until February 15, 1973.

[58] EPA has still not promulgated compliance schedules for a number of States. Of the remainder, many have been promulgated during 1974. *See* 40 C.F.R. Part 52.

EPA's interpretation illegal. *Natural Resources Defense Council, et al.* v. *Environmental Protection Agency*, 478 F.2d 875, 888 (1st Cir. 1973). Both the States and the Agency were on notice long ago that variances might not be available. Their reliance, if any, was plainly unjustified.

EPA has confused this issue by its failure to require some States to correct the failure in their State laws to distinguish between compliance schedules properly agreed-to when the State Plan was adopted, and later requests for additional compliance time. Some of the State laws that were enacted before the passage of the Clean Air Amendments adopt the fiction that emission limitations are immediately effective, subject to variances for non-complying sources. In developing their Implementation Plans, these States incorporated or adopted such "immediately effective" emission limitations, and later (pursuant to EPA's lenient policy on the submission of compliance schedules) began to submit State variances to satisfy the federal requirement for compliance schedules. Among these "variances" are the several thousand in the Fifth Circuit that EPA has referred to repeatedly before this Court.[59] Indeed it is fair to say that EPA's failure to correct this error in terminology when these States' Plans were submitted in 1972 is the reason why the Agency asked this Court to review the lower court's decision.[60]

EPA actually defined the term "compliance schedule" in 1972 in a way that would, if implemented, have solved this problem. In an amendment to its regulations, EPA defined a compliance schedule as:

> The date or dates by which a source is required to comply with specific emission limitations contained

[59] Pet. for Certiorari 8; EPA's Brief 17, 42-43.

[60] Pet. for Certiorari, 5-6, 8-9.

> in an implementation plan and with any increments of progress towards such compilance.

37 Fed. Reg. 26311 (Dec. 9, 1972), 40 C.F.R., § 51.1(p).

The accompanying definition of "increments of progress," in turn, made clear that the distinction, for purposes of federal law, between a compliance schedule and a true variance is that the former is individually negotiated as part of the Plan, while the latter is an attempt to extend a compliance schedule beyond its original expiration date. 40 C.F.R. § 51.1(q).

Thus EPA could have, and under the Act and its own regulations should have, prevented the present situation with a stroke of the pen. It still has this power. Instead, the Agency has chosen to ignore its own clarifying regulation, in the hope that it can use the ensuing confusion as a lever to coerce the courts into acceding to its incorrect interpretation of the postponement provision. This Court, like four of the five Courts of Appeal that considered the issue, should resist this attempt.

If EPA must disapprove the confused State schemes and promulgate federal regulations to take their place, that is a far better and more lawful result than for this Court to distort the plain meaning of the statute. Such a disapproval would not necessarily result in a significant burden on EPA, since it could simply promulgate a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules. This Court can make a clear statement that will prevent such a conversion from becoming a signal for frivolous challenges from the affected sources.

At the same time, however, EPA should be directed to clear up the grounds for the confusion which has brought this case before the Court. EPA should be ordered to disapprove prospectively all such confused State

schemes, and to promulgate clarifying federal regulations, pursuant to its powers under § 110(c) of the Act, 42 U.S.C. § 1857c-5(c), unless the States promptly correct their deficiencies. If such an order is issued, the Court will be free to place a proper interpretation on the statutory postponement and revision authorities without concern for its effect on the administration of the Act. Plainly, EPA should not be allowed to compound its original mishandling of these State laws by distorting the language and intent of Congress.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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December, 1974

Ga. Code Ann. § 88-912 (1971), VARIANCES.

The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved

by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.